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(15)

No. 06-593

In The Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL PRIVATE DUTY ASSOCIATION AS AMICUS CURIAE SUPPORTING THE PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The National Private Duty Association ("NPDA") is a voice for organizations across the nation that provide private home care services, including in-home companionship services. All of the companies that are members of the NPDA share one central guiding philosophy – quality home care services are essential to empowering the elderly to remain in their community where they can lead healthy, dignified, and independent lives. Thus, it is of utmost importance to the NPDA and its members that 29 C.F.R. § 552.109(a), a regulation promulgated by the U.S. Department of Labor (the "DOL") to exempt companionship workers who are employed by third parties from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA"), is found to be valid and enforceable.

The NPDA respectfully submits this amicus curiae brief in support of the petition filed by Long Island Care at Home, Ltd. and Maryann Osborne to review the decision of the United States Court of Appeals for the Second Circuit in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2nd Cir. 2006).[1]

SUMMARY OF THE ARGUMENT

It is imperative that in-home companionship services be kept affordable. The elderly and infirm, some of the most vulnerable populations in our society, require such services to maintain their dignity, health, and independence. The Second Circuit's decision in *Coke*, invalidating 29 C.F.R. § 552.109(a), has the potential to detrimentally impact the affordability of quality in-home companionship services

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[1] On February 1, 2007, the parties filed with the Clerk of the Court a blanket consent to the filing of amicus briefs in support of either party. NPDA certifies that this brief was not authored in any part by counsel for either party and no person other than amicus curiae, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

across the nation, resulting in undesirable alternatives such as institutionalizing our nation's elderly and infirm or subjecting these vulnerable populations to lesser quality care. Our nation's elderly and infirm should have the right to remain in their homes and communities for as long as practicable, a right the Court can preserve by reversing the Second Circuit's opinion, thereby ensuring the continued availability of quality in-home companionship care.

ARGUMENT

Since its adoption in 1975, 29 C.F.R. § 552.109(a) has relieved home care provider agencies of the onerous cost of complying with the FLSA's minimum wage and overtime requirements; which in turn, has afforded millions of working Americans with the opportunity to provide their elderly and infirm family members with in-home companionship services crucial to their loved one's ability to live relatively independent lives in their own homes and communities. Invalidating 29 C.F.R. § 552.109(a) will detrimentally impact the ability of the average worker to afford quality in-home companionship care.

It is projected that within the next two decades, 15.2 million people over the age of 65 will be living alone. *See* U.S. Department of Health and Human Services, Administration on Aging, *Aging into the 21st Century*, at Table 7 (May 31, 1996), available at http://www.aoa.gov/prof/Statistics/future_growth/aging21/aging_21.asp. Moreover, the number of elderly with poor health and the number of disabled are projected to sharply increase during the same time period. *Id.* at "Health Status" and "Disability." Consequently, the number of persons requiring help with at least one activity of daily living, such as bathing, dressing, incontinence care, toileting, eating, and transferring, will also rise sharply. *Id.* at "Summary."

The extension of the companionship services exemption to third party employers through 29 C.F.R. § 552.109(a) is the primary means by which home care provider agencies have been able to keep costs of in-home companionship affordable. Without it, average working adults are faced

with the choice of: (1) staying home to care for their elderly or invalid loved one, which in today's economy is not a viable option for most people; (2) institutionalizing their loved one; or (3) hiring an independent contractor, which places their loved one at a heightened risk of abuse or neglect due to the lack of proper screening, training, bonding, workers' compensation, liability insurance, supervision, and other safeguards offered by legitimate home care agencies. These undesirable alternatives can only be avoided by ensuring that affordable quality in-home companionship care remains available to those that need it.

As a result of the circuit split created by the Second Circuit's decision, in January 2007, the United States District Court for the Eastern District of Virginia certified to the United States Court of Appeals for the Fourth Circuit the very question currently before the Court – "Is 29 C.F.R. § 552.109(a) a valid and enforceable regulation." *Hanley v. Hand 'N Heart, L.L.C.*, (Nos. 4:06cv71 and 4:06cv143), 2007 WL 201088, at *13 (E.D.Va. Jan. 22, 2007). In *Hanley*, the District Court concluded that contrary to the Second Circuit's decision in *Coke*, which the District Court found to be unpersuasive, 29 C.F.R. § 552.109(a) is valid and enforceable regardless of whether it is considered a legislative or interpretive regulation. *Id.* In reaching this conclusion, the District Court noted, among other considerations, that:

> The companionship services exception ... promotes the availability of companionship services. Congress did not intend to place a heavy burden on working adults who are responsible for elderly or infirm relatives and who would be unable to afford domestic companionship services at overtime wages. *See* 2005 Wage & Hour Memo. at 2 (citing 119 Cong. Rec. at 24,797 (Sen.Dominick); *id.* at 24,798 (Sen.Johnston); *id.* at 24,801 (Sen.Burdick); Opinion Letter, Wage & Hour Div., Dep't of Labor, WH-368, 1975 WL 40991 (Nov. 25, 1975) ("Congress was mindful of the special problems of working fathers and mothers who need ... a person to care for an elderly invalid in their home.")). Senators

> Dominick and Johnston agreed that the exemption was necessary to avoid making domestic companionship services unaffordable to working class adults, who would then be required to care for their elderly or invalid family members on their own time and thus be unable to maintain employment themselves. 119 Cong. Rec. at 24,797-24,798. In earlier debate on the application of the federal minimum wage to companionship services, Senators Taft and Dominick feared that FLSA coverage of companionship services would force families to resort to the services of a nursing home. 118 Cong. Rec. 24,715. While the DOL initially proposed to limit the exception to employers not otherwise covered by the FLSA, both the 1974 proposal and the regulation adopted in 1975 created a class of domestic service employees who were not subject to the FLSA if they were providing companionship services. The economic impact of applying the FLSA to companionship services also persuaded the DOL to abandon its 2001 proposal to deny the companionship exemption to third-party employers altogether. *See* Application of the [FLSA] to Domestic Service, 67 Fed. Reg. 16,668 (Apr. 8, 2002) ("[N]umerous commentators on the proposed rule, including multiple government agencies such as the Small Business Administration and the Department of Health and Human Services, seriously called into question the Department's conclusion that [the proposal would have] little economic impact."). It is understandable that these considerations were persuasive to the DOL, as they are certainly persuasive to the Court. To the extent that these concerns apply to families caring for their elderly or infirm, they also necessarily apply to the elderly and infirm themselves. If the elderly or infirm, who are likely on fixed or otherwise-limited incomes, can obtain companionship services by their own means, then this would further reduce the burdens on their families.

Id. at *12.

Invalidating 29 C.F.R. § 552.109(a) will decrease the availability of quality home companionship services and will likely subject millions of our nation's elderly and infirm to institutionalization and a lesser quality of care. Such an unreasonable result can be prevented by overruling the Second Circuit's erroneous decision invalidating the rule.[2]

CONCLUSION

For the reasons stated above, the NPDA respectfully requests that the Court overrule the Second Circuit's decision in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2nd Cir. 2006).

Respectfully submitted,

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[2] To avoid unnecessary repetition, the NPDA joins in the numerous other arguments presented by the Petitioners and other amicus curiae in favor of overruling the Second Circuit's decision.